Rule 93 of the Kelang Port Authority By-laws, 1965 reads as follows:—

"If any owner, without any fault on the part of the Authority, fails to remove any goods (other than those stored under special agreement with the Authority) from the port premises within seven clear working days from the date of landing or placing in the custody of the Authority of such goods, the goods shall remain on the port premises at the sole risk and expense of the owner."

The learned judge quite rightly rejected the appellant's plea for two reasons. First, there was evidence to show that six days after the goods landed respondents called to collect the goods but appellants were unable to deliver them. Secondly, there was nothing to show that appellants had averred that the entire consignment was on the port premises throughout the period of seven days after landing. We think it is unfair for appellants to invoke rule 93 when they were blowing hot and cold. They denied they ever received the whole consignment, but evidence showed convincingly that the whole consignment was taken by their employees and kept in their premises soon after landing. They were unable to deliver when demanded before the week expired. Yet, they tried to blame respondents by invoking rule 93.

The clerks in charge of Shed No. 7 and Shed E could not say anything about the particular consignment. Neither could the traffic manager nor the police officer in charge of security throw any light on the particular consignment. Furthermore, record of goods being removed from one shed to another was kept but the record just conveniently disappeared. There seemed to be a sense of laxity among those working in the sheds due, perhaps, to lack of strict supervision.

On the facts the learned judge observed:—

"On the materials before me I am firmly of the view that the defendants had not taken all reasonable care of the consignment in their custody. The defendants' failure to produce records of internal tally seems to show that they had not paid due attention to the maintenance and safekeeping of records pertaining to goods in their custody. Their failure to disclose to the court whether any attempt was made by the port employees to trace the balance of the goods and indeed whether any investigation was made by the police concerning the missing goods necessarily indicates that they had not exercised due care as to the safety of the goods in their custody. I am also inclined to think that they had not properly discharged their duties and responsibilities as bailees of such goods."

These findings were made by the learned judge who had the advantage of seeing and hearing the witnesses and assessing their credibilities. The appellate court should be slow to interfere with such findings. The various points of law have been dealt with fully in *T.W. Wu & Company (M) Sdn. Bhd.'s* case and we do not wish to repeat them here. In this case there is no reason for this court to interfere with the findings of the learned judge.

The appeal would be dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Shook Lin & Bok.*

LEMBAGA PELABOHAN SWETTENHAM v. SYARIKAT HIAP BEE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 110 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded at wharf — Whether port authority liable — Burden of proof — Contract Act, 1950, ss. 104 and 105.

This was an appeal from the decision of the High Court which had ordered the appellants to pay damages to the respondents for the loss of 8 cases of stainless steel sheets. The cases were landed at Port Kelang and had been in the custody of the appellants.

Held: (1) where a bailor and bailee relationship exists, then the position is the same as at common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence;

(2) in this case the learned judge was right on the evidence to hold that the appellants had failed to show that the loss occurred otherwise than through their negligence.

Cases referred to:-

(1) *Port Swettenham Authority* v. *T.W. Wu & Company (M) Sdn. Bhd.* [1975] 2 M.L.J. 73.

(2) *British Traders & Shippers Ltd.* v. *Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority* [1952] 2 Lloyds L.R. 236.

FEDERAL COURT.

Abdullah bin Mohamad Yusof for the appellants.

N. A. Marjoribanks for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is yet another appeal by appellants against the decision of the same learned judge ordering them to pay damages in the sum of $31,378.24 to respondents for the loss of 8 cases of stainless steel sheets. Here again appellants adopted the submissions on points of law made by counsel in *Port Swettenham Authority* v. *T. W. Wu & Company (M) Sdn. Bhd.*[1] of which judgment has just been delivered.

Respondents were the consignees of 8 cases or crates of stainless steel sheets shipped on board S.S. "Kotoku Maru". The vessel arrived at Port Kelang on or about April 19, 1970. The goods were tallied and removed by forklifts by port employees to the yardstore where heavy goods were kept. Each crate measured 8'x5'x4' and weighed approximately one ton. Respondents instructed their forwarding agents to take delivery of the goods but the goods were never found. They made a claim against appellants who, as usual, replied that the goods were shortlanded.

The facts of this case are almost the same as those in *British Traders & Shippers Ltd.* v. *Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority.*[2] In that case 5 tons of corrugated metal sheets delivered to the Port of London Authority were found to have disappeared from the care and custody of the Authority. As the Authority were unable to show that the loss was not due to their negligence they were held liable. The Authority adduced detailed evidence concerning system and security. Lord Justice Morris held that the steel sheets had been delivered by the driver to the Authority. It was not good enough merely to show that the Authority had devised and evolved a good system

for the protection of the goods kept by them. The Authority must show that the loss was not due to their negligence.

The contention of the appellants that the onus was on the bailors to show that appellants as bailees were negligent found no favour with the learned judge. This submission was also made in the case of *Port Swettenham Authority* v. *T. W. Wu & Company (M) Sdn. Bhd.*[1] where we held that the learned judge was right on the question of onus. In our view, where a bailor and bailee relationship exists then the position is the same as the common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence.

In this case the Traffic Manager (DW1) gave evidence of system and security. The Chief Clerk (DW2) of the yardstore also gave evidence. But, both of them had no knowledge of the particular consignment. They could not, therefore, give evidence about the missing goods which might be of assistance to the court. Suffice to say that the learned judge was right on the evidence in this case to hold that the appellants had failed to show that the loss occurred otherwise than through their negligence. There is no reason for the court to interfere with his finding of facts.

We are aware that the Port Authority handled a considerable amount of cargo and pilferings were inevitable. But, when a whole consignment of bulky and heavy goods simply just disappeared from the watchful eyes of the port employees then something must be wrong with the system of protection of goods in the care and custody of the Authority. There is much force in the argument of the respondents that appellants could not be said to have devised and evolved a reasonable system of security when there were so many claims of shortlanding and non delivery of goods amounting to millions of dollars. There was practically no investigation in respect of port employees involved in releasing and checking goods at the store and gate. It seems bulky and heavy goods could be taken out of the port area with considerable ease. It is, therefore, not surprising that the learned judge should make these observations:—

"In consideration I am strongly inclined to conclude that the irresistible inference that arises was that the goods, if stolen, could only have been committed either by the failure of the defendants or of their employees to exercise such care and diligence required of them by law. I am indeed of the view that in all probability the theft, if committed, could not indeed have been done otherwise than through active participation or complicity of one or more of the defendants' employees."

This appeal would also be dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Lovelace & Hastings.*

HAJI NIK ISHAK BIN HAJI NIK DAUD v. NIK ZAINAB BINTI NIK JAAFAR

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) March 10, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 53 of 1973]

Contracts — Sale of land — Agreement that balance of purchase price to be paid by third person — Vendor cannot subsequently claim balance from purchaser — Contract Act, 1950, s. 42.

In this case the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was $25,000 and that for the respondent's land was $14,000 thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan $4,000 and (b) Nik Abdul Majid Yahya $7,000. Both Nik Hassan and Nik Abdul Majid were the sons of the respondent. Nik Abdul Majid did not settle the sum of $7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed in the High Court and he appealed to the Federal Court.

Held, dismissing the appeal; as the appellant had agreed to accept performance of the promise from the third person, he could not under section 42 of the Contract Act, 1950, enforce it against the respondent.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk Wan Mustaffa for the respondent.

Ali F.J.: This is an appeal against the dismissal of the appellant's claim for $7,000.

The claim arose out of a transaction involving the transfer of appellant's land, Lot No. 60, to the respondent and the transfer of respondent's land, Lot No. 177, to the appellant. Both transfers were executed on March 21, 1965.

The appellant's case, as stated in the pleadings, is that the consideration for the transfer of Lot No. 60 was $25,000 and that for Lot No. 177 was $14,000, thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan Yahya, $4,000, and (b) Nik Abdul Majid Yahya, $7,000. Both Nik Hassan and Nik Abdul Majid are the sons of the respondent. In this appeal we are only concerned with the sum of $7,000 which was agreed to be settled by Nik Abdul Majid.

The manner in which Nik Abdul Majid Yahya was to settle the amount is described in paragraph 6(c) of the statement of claim in these words —

"The defendant's son Nik Abdul Majid Yahya agreed to build and complete a building on plot No. 5 of Lot No. 47 Section 24, Kota Bharu and to transfer the said plot of land and building to and for the benefit of the *defendant's* nominee Nik Halimah binti Abdul Rahman for the value of $16,000 and agreed to acknowledge receipt of payment of a deposit of $6,300 and $700 for additions to the building and loan charges from the balance of the said consideration due from the defendant to the plaintiff;"

(The word "*defendant's*" as italicized appears to be a typing error. It should read "*plaintiff's*").

Immediately following the above stated averment the appellant went on to say that Nik Abdul Majid made oral representation that he had the power and authority to sell the land and house to Nik Halimah and it was on such representation that he (the appellant) accepted the offer to settle. Having said that, he went on to allege that the said representation by